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IN THE
Supreme Court of the United States
OCTOBER TERM, 1984

HAROLD TRAVIS LYONS,
Petitioner,
v.

WARDEN, NEVADA STATE PRISON,
Respondent.

**ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF
THE STATE OF NEVADA**

**BRIEF OF THE RESPONDENT IN OPPOSITION
TO PETITION FOR WRIT OF CERTIORARI**

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QUESTIONS PRESENTED

Whether this Court should decline discretionary review in this matter in accordance with Rule 17.1 of the Rules of the Supreme Court.

A. Whether the Nevada Supreme Court erred in determining that there was no factual or legal basis demonstrated by petitioner for the grant of habeas relief based on ineffective counsel.

B. Whether the Nevada Supreme Court erred in determining that petitioner was not denied due process based upon the filing by the state of a supplemental information charging petitioner with being an habitual criminal three days prior to the entry of a plea of nolo contendere by petitioner.

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OPINIONS AND
JUDGMENTS DELIVERED BELOW

The petitioner, Harold Travis Lyons, seeks certiorari from this court to review the decision of the Supreme Court of Nevada reported in Warden, Nevada State Prison v. Lyons, 100 Nev. ___, 683 P.2d 504 (Adv.Op. 90, filed July 3, 1984) (reprinted in Appendix A at 1a in the Petition for Writ of Certiorari). The state supreme court reversed the grant of habeas corpus relief to petitioner by the lower state district court which is not officially reported. Lyons v. State of Nevada, No. C58393, Order Granting Writ of Habeas Corpus for Post-Conviction Relief (Nev. 8th Jud.Dist.Ct., filed July 7, 1983) (reprinted in Appendix A at 6a in the Petition for Writ of Certiorari). The Supreme Court of Nevada denied rehearing in an unreported decision on August 27, 1984.

JURISDICTIONAL STATEMENT
AND CONSTITUTIONAL AND
STATUTORY PROVISIONS INVOLVED

The jurisdiction of this Court is invoked under section 1257(3) of Title 28 of the United States Code. The Petition for Writ of Certiorari has set forth the pertinent text of the constitutional and statutory provisions which may be implicated in this case. See U.S. Const. amend. IV; id., amend. V; id., amend. VI; id., amend. XIV, § 1. The seventh amendment is not involved here contrary to the assertion of petitioner. See also Nev.Rev.Stat. §§ 207.010, 465.080, 465.101 (1983).

STATEMENT OF THE CASE

In order for this Court to make a proper assessment of the propriety of certiorari in this action, respondent believes a fairly detailed review of the background of this case is necessary. Petitioner has claimed in habeas corpus proceedings that his pleas of nolo contendere to felony charges of slot cheating in the Nevada state courts were involuntary. How those pleas came about must be reviewed prior to turning to the state habeas proceedings. All of the facts stated herein are supported by the record which was before the Nevada Supreme Court.

A. Procedural History

1.) The Criminal Charges.--Petitioner was initially detained on July 28, 1979, at the MGM Grand Hotel and Casino in Reno,

Nevada after having been caught cheating at a slot machine by MGM Security Officers. Petitioner was indicted on September 19, 1979, by the Washoe County Grand Jury in Reno for the felonies of slot cheating and possession of a slot machine cheating device.¹ Petitioner retained attorneys Jerome Polaha and John Conner and, on October 11, 1979, petitioner pled not guilty to the felony offenses. On July 23, 1980, petitioner's attorney requested to be relieved as counsel based upon the fact that petitioner no longer desired the services of his attorney and, on July 11, 1980, new counsel, Mr. Kent Robison, entered his appearance as counsel for petitioner.

Petitioner was subsequently caught

¹ The proceedings arising out of this indictment will be referred to herein as the "MGM case."

slot cheating at the Hyatt Lake Tahoe Casino on May 23, 1980, and at the Harold's Club in Reno on June 16, 1980. Criminal informations against petitioner were filed for these felonies in Washoe County on November 7, 1980 and November 17, 1980, respectively.²

On November 28, 1980, a criminal information supplemental to the indictment was filed against the petitioner in the MGM case. That supplemental information charged petitioner with being an habitual criminal as defined in section 207.010 of the Nevada Revised Statutes. On December 1, 1980, the time set for trial on the MGM case charges, petitioner withdrew his not guilty plea and pled nolo contendere to

² The proceedings following these criminal charges will be referred to herein as the "Hyatt case" and "Harold's Club case" respectively.

both counts. The State of Nevada had agreed not to ask for more than ten years on the first count and to recommend concurrent time on count II if time was received on the second count. The state also agreed that it would dismiss the habitual criminal charge at the time of sentencing and would dismiss the charges of slot cheating in the Hyatt case and Harold's Club case. Petitioner was then canvassed as to his knowledge and the voluntariness of his plea. Sentencing was set for February 3, 1981.

On January 22, 1981, petitioner was arrested at the Sahara Hotel and Casino for slot cheating and was later charged.³ Petitioner failed to appear for sentencing on the MGM case on February 3. As a result, the charges against the petitioner

³ The proceedings following these charges will be referred to as the "Sahara case."

for the Hyatt and Harold's Club cases were not dismissed and trial dates were set. He again failed to appear on those dates set for trial. Petitioner was arrested in Florida, received bail, and failed to return on the date set in Florida. Petitioner was subsequently arrested in New Jersey and returned to Nevada.

Petitioner appeared on January 29, 1982, in the MGM case in Reno. At that time, petitioner and his attorney, Mr. Robison, requested that Mr. Robison be relieved as counsel. Petitioner claimed that his attorney coerced him into his plea. Counsel denied this in open court claiming that petitioner was lying. Another attorney, Chet Kafchinski, was appointed on February 4, 1982, to represent petitioner and he indicated his intent to file a motion to withdraw petitioner's original plea of nolo contendere. Never-

theless, on February 25, 1982, petitioner did not withdraw his plea in the MGM case as a part of a bargain involving the Sahara case. The state had agreed that the time received on the Sahara charges would be served concurrently with any time given in the MGM case. The court then sentenced the petitioner in accordance with the plea negotiations. Petitioner was subsequently arraigned on March 2, 1982, in the Sahara case. At that time, petitioner entered a plea of nolo contendere to the felony count of possession of a slot machine cheating device. In return for the plea, the state agreed to dismiss count II, not file an habitual criminal allegation or pursue the four failure-to-appear charges. The state would also recommend that any sentence received would run concurrent to the MGM sentence. Petitioner was then sentenced accordingly and the promises made by the

state were then fulfilled.

2.) State Habeas Proceedings.--On June 8, 1982, petitioner, while being housed at a state prison facility in Clark County, Nevada, filed a petition for writ of habeas corpus in the Eighth Judicial District Court of the State of Nevada in Las Vegas, County of Clark, Nevada. In his pro per petition of some thirty-seven pages, petitioner claimed that he was deprived of effective assistance of counsel in the MGM case in that his attorney, Kent Robison, failed to file motions to suppress evidence and statements of petitioner as petitioner had insisted and that Attorney Robison, in concert with the prosecutor, compelled petitioner to plead guilty. Petitioner also claimed that illegal evidence had been used to coerce his guilty plea in that the MGM Hotel security guard who seized petitioner searched and failed to advise peti-

tioner of his constitutional rights prior to interrogation. Finally, petitioner claimed that his plea had been obtained through duress when the habitual criminal allegation was filed three days before the scheduled jury trial. Petitioner claimed in one final sentence that his plea in the Sahara case had been similarly coerced.

An attorney was then appointed to represent petitioner and the petition was initially denied without an evidentiary hearing in September of 1982. Petitioner's appointed counsel then withdrew and petitioner filed a pro per motion for rehearing claiming that his appointed counsel had been derelict in his duties. Petitioner also filed a twenty-five page memorandum of points and authorities in support of his motion for rehearing.

The state district court eventually granted what appeared to be habeas relief

and petitioner's present counsel entered an appearance on behalf of petitioner in February of 1983. The state district court subsequently explained that it had not granted habeas relief but had only granted petitioner a hearing on his claims. After several hearings on procedural matters, an evidentiary hearing on petitioner's substantive claims was held on May 27, 1983. Petitioner presented no witnesses or testimony and the State of Nevada called petitioner's second counsel, Chet Kafchinski. Subsequently, on June 14, 1983, the state district court granted permanent habeas relief for petitioner based only "on the fact that [petitioner's] plea was not properly taken." Petitioner's counsel subsequently prepared an order granting habeas relief which was signed by the district court judge on July 7, 1983. The State of Nevada appealed the decision of

the district court to the Nevada Supreme Court. The Nevada Supreme Court reversed. Warden, Nevada State Prison vs. Lyons, 100 Nev. at ___, 683 P.2d at 504.

B. Statement of Facts

Unfortunately, petitioner has alleged facts in his Petition for Writ of Certiorari which are in no way supported by any of the record filed with the Nevada Supreme Court or the lower state court in the habeas proceedings. Respondent agrees that petitioner was detained by private hotel security guards at the MGM Grand Hotel and Casino in Reno after having been caught cheating a slot machine. Petitioner was also interrogated by casino security guards and slot cheating devices were found on petitioner and removed by the security officers. The grand jury transcripts present in the record before the state

courts demonstrated that state gaming agents arrived after petitioner had made statements and evidence was taken from him.

With regard to the habeas corpus proceedings at the state district court level, petitioner presented no evidence or testimony supporting his allegations that his pleas were not knowingly and voluntarily entered. On the otherhand, the State of Nevada presented the testimony of petitioner's second attorney, Chet Kafchinski, who stated that he had discussed with petitioner the possibility of petitioner withdrawing his nolo contendere plea in the MGM case. Mr. Kafchinski testified that he did not believe petitioner had grounds to withdraw his plea but that such a motion would be made if petitioner so desired. Petitioner was also informed by Mr. Kafchinski that he believed the plea bargain originally entered was a good one especially in

light of the fact that four charges for failure to appear could also be filed and that the habitual criminal charge would be filed against petitioner. There is no support for the allegations of fact made by petitioner in his petition before this Court as to what representations were made by Mr. Robison to petitioner.

SUMMARY OF THE ARGUMENT

This Court should decline to review the decision of the Supreme Court of Nevada. Petitioner's factual assertions of ineffective counsel are not supported by the record in the state habeas courts. The decision of the state supreme court rejecting independent claims of a defendant prior to a plea of nolo contendere is not in conflict with the decisions of this Court or federal appellate courts. Similarly, the Nevada Supreme Court correctly rejected other claims of petitioner that his counsel

was ineffective.

Petitioner has also claimed that his due process rights were violated when state prosecutors filed an habitual criminal allegation three days prior to the entry of petitioner's plea of nolo contendere to the felony charges. The decision of the Supreme Court of Nevada rejecting the claim is supported by the facts and is in accordance with the decisions of this Court.

REASONS FOR DENIAL OF THE
PETITION FOR A WRIT OF CERTIORARI

Respondent contends that a review of the decision of the Nevada Supreme Court would be an unnecessary expenditure of this Court's resources. The decision of the state supreme court is in accord with the decisions of this Court and federal and state appellate courts. See Sup.Ct.R. 17.1(b)-(c). Perhaps, more importantly, petitioner has made factual assertions

which are not supported by the record which would be before this Court should a review be undertaken.

A. The Claim of Ineffective Assistance of Counsel.

As stated previously, petitioner alleged in the state habeas court that he was denied the effective assistance of counsel when Mr. Robison failed to file motions to suppress evidence in the MGM case and compelled petitioner to plead no contest to the charges. The state habeas district court granted relief in spite of the fact that petitioner had presented absolutely no evidence or testimony regarding the circumstances. This ruling was also in spite of the fact that the state had argued that petitioner's plea of nolo contendere was a waiver of all constitutional claims based upon events occurring

prior to the entry of that plea. The Supreme Court of Nevada agreed in its decision that petitioner's substantive fourth amendment claim was not cognizable for this reason. Warden v. Lyons, 100 Nev. at ____, 683 P.2d at 505.

Petitioner erroneously contends that the decision of the Nevada Supreme Court is in conflict with the decision of the Eighth Circuit Court of Appeals. Petitioner cites the case of United States v. Easter, 539 F.2d 663 (8th Cir. 1976), cert. denied, 434 U.S. 844 (1977), in support of his claim that the failure of defense counsel to file a pretrial motion to suppress evidence constitutes ineffective assistance of counsel. Petitioner fails to note that, in Easter, the attack of the conviction on direct appeal was not precluded because the defendant had been convicted following a jury trial and did not waive his fourth amend-

ment constitutional claims by entering a plea of guilty or nolo contendere.

The decision of the Supreme Court of Nevada is in accord with the decisions of this Court which preclude defendants who have pled guilty from thereafter raising independent claims relating to the deprivation of constitutional rights occurring prior to the entry of a guilty plea. Tollett v. Henderson, 411 U.S. 258, 267 (1973). See also McMann v. Richardson, 397 U.S. 759 (1970). The Nevada Supreme Court has previously rendered similar decisions relying on the decisions of this Court. See A Minor v. State, 99 Nev. 845, 673 P.2d 493 (1983); Cline v. State, 90 Nev. 17, 518 P.2d 159 (1974).

It can also be seen that the Nevada Supreme Court stated in a footnote in its decision that petitioner's counsel was not ineffective for failing to file a suppres-

sion motion and that, even had a suppression motion been made on behalf of petitioner, it would have been without merit under federal and state law. Warden v. Lyons, 100 Nev. at ___, 683 P.2d at 505-06 n.3, citing Burdeau v. McDowell, 256 U.S. 465 (1921); Radkus v. State, 90 Nev. 406, 528 P.2d 697 (1974). By citing these cases, the state supreme court determined that state agents were not involved in the search or interrogation of petitioner. As stated above, there was no factual support in the Nevada courts for petitioner's representations or inferences that state agents were involved.

Petitioner's second claim of ineffective counsel was that he was not advised that the charge contained in count II of the MGM case indictment was a lesser included offense of the charge contained in count I. Again, however, petitioner failed

to present any evidence that he was not so informed or that it prejudiced him. The certified copies of transcripts presented to the state habeas court demonstrated that the sentencing court stated in front of petitioner that the second count was a lesser included offense of count I. Secondly, and as noted by the Nevada Supreme Court, petitioner only received a sentence of ten years on the first count and a concurrent five-year term on the second count in the MGM case and a concurrent five years in the Sahara case. As such, petitioner does not have a valid claim of double jeopardy. Cf. Whalen v. United States, 445 U.S. 684 (1980) (federal court could not impose consecutive sentences for killing in the course of rape as Congress intended the rape to be a lesser-included offense). Even had petitioner received consecutive sentences, cumulative

punishment might be appropriate if authorized by the state legislature. See Missouri v. Hunter, 459 U.S. 359 (1983); Albernaz v. United States, 450 U.S. 333 (1981).

Petitioner has claimed no other bases for alleging ineffective counsel. Nevertheless, petitioner contends that the Nevada Supreme Court should have analyzed his claims in accordance with five factors enumerated by this Court in United States v. Cronin, ___ U.S. ___, 104 S.Ct. 2039 (1984), and that a review of the Nevada Supreme Court's decision is necessary to avoid a gross miscarriage of justice in this case. Petitioner is apparently referring to the reference by this Court to the factors listed by the opinion of the court of appeals from which the case originated. But those factors have nothing to do with the conclusory and specific claims alleged

by petitioner in the state habeas court in this action. See id. at ____, 104 S.Ct. at 2049-51. The Nevada Supreme Court did review the various claims of ineffective counsel and concluded that counsel was not ineffective under Strickland v. Washington, ____ U.S. ____, 104 S.Ct. 2052 (1984). The only gross miscarriage of justice in this case is that the state habeas court granted relief to petitioner even though petitioner failed to present any evidence or legal basis for such relief.

B. Habitual Criminal Charge

Petitioner also claimed that he was denied due process and that his pleas of nolo contendere were rendered involuntary due to what petitioner termed the "last minute filing of the supplemental information charging him with being an habitual criminal." As the facts above demonstrate,

the habitual criminal allegation was filed after petitioner had been arrested two more times on slot cheating charges after his original arrest in the MGM case. The Nevada Supreme Court has previously held that a guilty plea is not coerced merely because it is motivated by a desire to avoid the possibility of a higher penalty. Schoultz v. Warden, 88 Nev. 135, 139, 494 P.2d 274, 276 (1972), citing Brady v. United States, 397 U.S. 742 (1970). See also Stocks v. Warden, 86 Nev. 758, 476 P.2d 469 (1970).

Petitioner seemingly also contends that the prosecutor was vindictive and that this Court should reassess its holding in Bordenkircher v. Hayes, 434 U.S. 357 (1970). Petitioner has only made the bald, unsupported assertion that the Bordenkircher holding "has sanctioned widespread prosecutorial abuse in plea bargaining

. . . ." As with most of his other assertions, petitioner has no factual support in the record for his assertion. The facts of this case as indicated above also indicate that petitioner's new arrests may have prompted the prosecutor to file the habitual criminal charge. In any event, petitioner failed to make any record of his actual fears regarding the habitual criminal charge before he entered his nolo contendere plea. That is exactly the finding of the Nevada Supreme Court which also found that petitioner "gave no indication of any feeling of coercion at the MGM plea canvass" Warden v. Lyons, 100 Nev. at ____ , 683 P.2d at 505.

CONCLUSION

The rules of practice of this court provide that certiorari review of judgments from a state court may be appropriate when the state court has rendered a decision in

conflict with decisions of another state court or federal court of appeals or when the state court has rendered a decision on an important question of federal law which should be settled by this Court or which is in conflict with applicable decisions of the Court. Sup.Ct.R. 17.1(b)-(c). As noted above, petitioner has totally failed to demonstrate the existence of a conflict between the decision of the Nevada Supreme Court and the decision of any other state or federal appellate court. In fact, it has been demonstrated that the decision of the Nevada Supreme Court was in accord with the decisions of this Court. Based upon the absence of factual support for petitioner's claims and based upon the fact that petitioner has failed to demonstrate a conflict between a decision of the Nevada Supreme Court and other case authority, this Court should decline discretionary

review of the judgment of the Supreme Court
of Nevada.

DATED: March 6, 1985.

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